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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1060

EUCLID-TENNESSEE, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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This reply memorandum is solely for the purpose of answering contentions made by respondent which were not anticipated in the petition for certiorari.

Respondent has reworded and changed the meaning of the stipulation of the parties with respect to petitioner's real estate "owning and leasing business." The exact language of the stipulation is set forth on page 4 of the peti-

tion.[1] The fact that there was no intention of engaging "permanently" in this business "if the property could be sold advantageously" does not justify respondent's argument that the business was not a genuine, active business. In *Glover Packing Co. of Texas* v. *United States*, 328 F.2d 342 (Ct. Ch. 1964), the taxpayer corporation (unlike petitioner in the instant case) was trying to find a buyer for its real estate, after abandoning the meat packing business, but meanwhile leased the real estate. Taxpayer in that case contended that its rental activities were not a "business" but were "merely makeshift activities which never were or could have been profitable." The government's brief successfully refuted this contention by citing numerous cases holding that such an operation did constitute a business. We quote as follows from the government's brief in *Glover*:

> ". . . In *Stratton* v. *Commissioner*, decided September 14, 1962 (1962 P-H T. C. Memorandum Decisions, par. 62,218), where an individual, who was a full-time attorney, had a single house constructed with a view to selling it, but leased it for two years at a reduced rental while he was attempting to sell it, the Tax Court held that he was in the business of renting real property, even though he held no other rental properties and even though he sold the house in question at the end of the two-year period. Again, *Lagreide* v. *Commissioner*, 23 T. C. 508, held that a full-time teacher who inherited a residence from her mother, rented it for portions of two years for $25 a

1. The stipulation (made pursuant to Rule 31(b) of the Tax Court's Rules of Practice and carefully worded) does not justify the statement in respondent's Memorandum that petitioner's "corporate life was continued to permit liquidation of its real estate" (pp. 3-4); or the statement that petitioner "rented its real estate only in an effort to minimize its losses while winding up" (p. 3); or the statement that petitioner's operations consisted of the "leasing on an interim basis of a parcel of real estate, which it was attempting to sell" (p. 4). It was not stipulated or in any way implied that petitioner was attempting to sell the real estate, and there was no evidence to that effect.

month, and owned no other rental property, was in the business of leasing real estate. *Post* v. *Commissioner*, 26 T. C. 1055, decided that a taxpayer who inherited an undivided interest in a single piece of real estate, participated in a lease of the property for less than a year, then sold it, and appears to have held no other rental property, was engaged in the business of leasing. Other cases in this line of authority are *Fackler* v. *Commissioner*, 133 F.2d 509 (C. A. 6th), and *Hazard* v. *Commissioner*, 7 T. C. 372. The present situation probably presents a stronger case for a holding that the leasing activities constituted a business than do any of the cited decisions, because it involves a *corporation* (all of the other cases dealt with individuals) and the *only* activities of the corporation at the time were the leasing operations."

It is obvious that the decision below is in conflict with *Glover*, bearing in mind that the factual situation was the converse of the one here presented. The Court of Claims correctly held in *Glover* that taxpayer's "sole business," after the abandonment of the meat packing operation "was the leasing of its building." In the instant case, petitioner's "sole business" after the abandonment of its brewery operation, was the management and leasing of its real estate. In *Glover*, the taxpayer resumed the meat packing business but failed to continue the real estate business. In the instant case the petitioner continued the real estate business but did not resume the beer business.

Respondent argues that the "character" of petitioner's real estate leasing operation changed substantially after the change in stock ownership, in that some of the tenants were affiliated corporations. (Memorandum, pp. 3-4). This is immaterial. To quote from *Koppers Co., Inc.* v. *United States*, 229 F. Supp. 159 (U.S.D.C., W.D. Pa. 1964), at p. 165:

". . . Neither the Code, the Regulations, nor the decisions give the slightest support to the proposition that the business must be carried on in substantially the same manner. The question is whether it is substantially the same business."

It is next argued that the real estate revenues were insignificant in relation to the equipment business revenues. This is also immaterial. Neither the Code nor the Regulations have anything to say about the relative volumes of the continued business and the new business.

Finally, respondent asserts that the decision below does not conflict with *Maxwell Hardware Co.* v. *Commissioner,* 343 F.2d 713 (C. A. 9), on the theory that the Court of Appeals, in the instant case, "did not invoke the *Libson Shops* test." (Memorandum, p. 5). The language used by the Court of Appeals was that the "broad principles" of *Libson Shops*[2] were "relevant." The attempted distinction is mere quibbling over verbiage. It is, of course, true, as stated in respondent's footnote 4, that in *Maxwell Hardware* the issue under Section 382(a) was change in stock ownership rather than change in business, but in both cases there was literal compliance with Section 382(a) and the ultimate issue was the application of the *Libson Shops* principle. On this crucial point the two courts reached opposite conclusions.

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2. *Libson Shops* v. *Koehler,* 353 U.S. 382.

CONCLUSION

For the reasons above set forth, it is submitted that the opposition to the petition for certiorari is based on untenable grounds, and that the petition should be granted.

Respectfully submitted,

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